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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1156 118

E. L. O'NEAL, ADMINISTRATOR,
Petitioner,

vs.

UNION PRODUCING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

G. P. BULLIS,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1256

E. L. O'NEAL, ADMINISTRATOR,

Petitioner,

vs.

UNION PRODUCING COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

To the Honorable, the Supreme Court of the United States:

Petitioner, E. L. O'Neal, Administrator, prays that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Fifth Circuit, in the above suit.

Jurisdiction

Review is sought under United States Code, Title 28, Section 347 (Judicial Code, Sec. 240). The judgment of the Court of Appeals was rendered Jan. 30, 1946, reported

in — Fed. (2) —. Rehearing was applied for on Feb. 16, 1946, and petition for rehearing was denied by the Court of Appeals on March 1st, 1946.

Statement of the Matter Involved

Petitioner (E. L. O'Neal, Administrator) brought this suit for royalties due him from respondent (Union Producing Co.) under an oil and gas lease, on his farm situated in the State of Louisiana. The lease sued on (R. 7) is in the general form almost universally used at least in the southwestern gas fields, and contains the usual stipulation that the land-owner shall receive, as royalty for the use of his land, one-eighth of the oil and gas produced.

Petitioner's Complaint (R. 2) recited that under this lease, respondent produced from his land large quantities of natural gas. This gas contained, in suspension, gasoline. Respondent took the gas to an extraction plant in the gas field, where this gasoline was extracted. Respondent then made two sales, one of the gasoline, the other of the gas after gasoline extracted, called dry gas. The gasoline content must be extracted to make natural gas usable.

The value and market price of the gasoline extracted from this gas was 1.25¢ per thousand cubic feet of gas, and the value and market price of the dry gas, after gasoline extracted, was 5¢ per thousand cubic feet (R. 5).

Under the lease requiring respondent to pay to petitioner, as land-owner, one-eighth royalty, respondent paid to petitioner royalty on dry gas at the rate of 3¢ per thousand cubic feet, and refused to pay any royalty whatever on the gasoline. Petitioner brought this suit to enforce payment of 1/8 royalty on the gasoline, and additional 2¢ royalty on the dry gas.

The District Court dismissed petitioner's claim for royalty on gasoline, *in limine*, by sustaining respondent's mo-

tion to strike this demand from the complaint (R. 12). The District Court's opinion (R. 26) is that the lease contract sued on does not mention any royalty on gasoline, but only royalty on oil and gas, hence the land-owner can recover no royalty on gasoline produced from his land.

Subsequently respondent confessed judgment for the additional 2¢ royalty on dry gas (R. 37), and the case ended with judgment in favor of petitioner for this 2¢ additional royalty on dry gas (R. 42).

The Court of Appeals affirmed this judgment. The gist of their decision is:

> "The royalties provided for in the contract were for the gas, and not for the gas and also for any elements that might later be taken by some artificial process from the gas."

Questions Presented

1. Has the Court of Appeals decided an important question of local law, namely, the right of a land-owner to royalty on gasoline produced from his land, in a way in conflict with the decisions of the Supreme Court of Louisiana on the same question; this being a suit on a contract made and performed in Louisiana?

2. Has the Court of Appeals denied to petitioner, and to all royalty owners, due process of law, by permitting gas producers to take a valuable product, gasoline, from their lands without paying anything for it?

Reasons Relied On for Allowance of Writ

Question No. 1

This being a suit on a contract made and performed in Louisiana, pertaining to Louisiana real estate, the rule in the case of *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64,

requires that it be decided according to the jurisprudence of the Supreme Court of Louisiana, the highest Court of that State.

The Supreme Court of Louisiana has expressly decided this identical issue in four cases:

Wemple v. *Producers Oil Co.*, 134 La. 1031, 83 So. 232;
Coyle v. *Louisiana Gas & Fuel Co.*, 175 La. 990, 144 So. 737;
Crichton v. *Standard Oil Co.*, 178 La. 57, 150 So. 668;
Wall v. *United Gas Public Ser. Co.*, 178 La. 908, 152 So. 561.

In each of these cases, the Supreme Court of Louisiana held that in leases substantially the same as the lease at bar, the land-owner is entitled to royalty on the gasoline produced, in addition to royalty on the dry gas from which the gasoline was extracted. In brief annexed, petitioner quotes the exact language of that Court in these decisions.

The decision of the Court of appeals seems squarely in conflict with those decisions.

QUESTION NO. 2

The decree of the Court of Appeals permits respondent to take from petitioner's land, a very valuable product, gasoline, and pay petitioner nothing for it. This seems highly unjust; and also contrary to the contract of lease.

Louisiana law reads (Act 252 of 1925, Dart Section 4783):

> "Gas means natural gas as it is taken from the earth, including any gasoline content it may have, but it does not include casing-head gas."

Under Louisiana law, where this lease stipulates a 1/8 royalty to petitioner on "gas", this includes the gasoline content. So the ruling of the District Court, affirmed by

the Court of Appeals, that petitioner is not entitled to royalty on the gasoline content, seems to deny to petitioner his contractual right.

Since petitioner has a contract entitling him to royalty on gasoline, and since the Court of Appeals refuses to enforce this contract, the decision seems to deny to petitioner due process of law.

The opinion of the Court of Appeals states, inadvertently, that the petition (complaint) in the District Court states, and it was admitted, that the market value of the gas at the well was 5¢. This is patent error, because, a reading of the petition shows that it states plainly that 5¢ was the value after the gasoline was extracted, and the District Court decided on that basis.

Importance of Question

Natural gas is one of the nation's great assets. It is produced largely in Texas, Louisiana, and Oklahoma, and piped from there over a large part of the United States.

Most of the gas produced in that area is produced under contracts similar to the lease at bar, namely, that the land-owner permits the gas-producer to come on his land and drill for gas, and the land-owner receives one-eighth of the product.

The decision in the case at bar settles the law for all this industry. If the jurisprudence of the Court of Appeals stands, it takes from the pockets of farmers and land-owners, and gives to the large gas producers, all gasoline royalties, amounting undoubtedly to many millions of dollars.

Prayer

Wherefore petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit, to certify and send to this Court a full

transcript of the record and all proceedings in the case of *E. L. O'Neal,* Administrator, versus *Union Producing Co.,* No. 11,419 on the docket of said Court; and that finally the judgment of the Court of Appeals be reversed, and the case be remanded to the United States District Court for the Western District of Louisiana for trial of the issue as to the amount of royalty due to petitioner on gasoline produced from his farm; prays for such other relief as to this Court may seem proper.

G. P. BULLIS,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1256

E. L. O'NEAL, ADMINISTRATOR,

Petitioner,

vs.

UNION PRODUCING COMPANY,

Respondent

BRIEF SUPPORTING PETITION FOR WRIT

MAY IT PLEASE THE COURT:

This is a suit based on a written contract of lease, in substantially the same form as is almost universally used in the natural gas business. The lease provides (R. 7) that lessee is permitted to go on the land of lessor to drill for oil and gas, and stipulates that lessor shall receive the following royalty as recompense for the taking of oil and gas from his land (R. 8):

> "In consideration of the premises, the said lessee covenants and agrees:
>
> "1st. To deliver to the credit of lessor, free of cost, in the pipe line to which he may connect his wells, the

equal one-eighth part of all oil produced and saved from said leased premises.

"2nd. To pay the lessor *1/8 part of the net proceeds at prevailing market price at well for the gas from each well where gas only is found,* while the same is being used off the premises, and lessor to have gas free of cost from any such well for all stoves and all inside lights in the principal dwelling house on said land during the same time by making his own connections with the wells at his own risk and expense.

"3rd. To pay to lessor for gas produced from any well and used off the premises for the manufacture of casing head gas, 1/8 part of the net proceeds at prevailing market price at well, for the time during which such gas shall be used." (Italics ours.)

The District Court decided one-half of petitioner's suit, on demurrer or motion to strike (R. 12), and the other half on respondent's confession of judgment (R. 37), hence there was no evidence adduced of any kind, and the facts stated in petitioner's bill of complaint (R. 2) are to be accepted as correct for decision of this case.

The facts stated in the Complaint are simple and clear. Respondent took from petitioner's land, large quantities of natural gas. They extracted from it the gasoline content, which had a value of 1.25¢ per thousand cubic feet, and then sold the dry gas, after the gasoline had been extracted, for 5¢ per thousand cubic feet. They refused to pay petitioner anything as royalty for gasoline, and paid petitioner on the basis of only 3¢ per thousand cubic feet for the dry gas.

Petitioner then filed this suit, claiming royalty on gasoline of 5¢ per gallon, amounting to 1.25¢ per thousand cubic feet of gas, and additional royalty of 2¢ per thousand cubic feet on the dry gas, after gasoline extracted.

Respondent filed, *in limine,* a motion to strike the claim for gasoline royalty (R. 12).

The District Court sustained this motion, and struck from the bill of complaint all claims for royalty on gasoline. The District Court rendered a lengthy opinion (R. 26), the gist of which is on page 31 as follows:

> "The Court went a long way in both the Wemple and Gilbreath cases to protect the lessor against the consequence of what was at the time of those leases, a comparatively new discovery in the petroleum industry, and which otherwise would have enured solely to the benefit of the lessee under contracts already made when the fact became generally known. . . . However, the present lease was made in 1926, when, in most of the fields of the country where gas was produced containing gasoline of a commercial value, the latter was extracted, and in Louisiana was required by the Conservation Department of the State. In fact, many of the contracts today expressly provide for the lessor's participation in the profits arising from extraction of the gasoline from natural gas. It can scarcely be said, therefore, that the plaintiffs did not know or could not have had in contemplation at the time of the lease, conditions which were fairly well known to the public generally. If they saw fit to make a contract for the sale of the production of a "well producing gas only," and "to be paid one-eighth (⅛) of the value of such gas, calculated at the rate of market price per thousand cubic feet." there was no reason in law or in morals why they could not do so. And to say that the price should be determined according to the one course or the other pursued by the lessee, would make it depend, not upon the value of the gas as fixed by the contract, but the purpose to which it was put by lessee."

In accordance with this opinion, the District Court rendered judgment, reading as follows on this issue (R. 43):

> "Defendant's plea that plaintiffs are entitled to no royalties whatever on gasoline extracted and manufactured off the leased premises, from gas produced

> under the terms of the contract of lease here sued upon, be and it is hereby sustained."

Thus the District Court held that because petitioner's decedent signed this lease at a time when it was known that natural gas contained valuable gasoline in suspension, and did not mention any royalty on gasoline in the lease, therefore the lessee got the gasoline without paying any royalty to the land-owner.

If the facts were as stated by the District Court, the result would be the exact opposite. The lease sued on gives lessee the sole right to produce oil and gas (R. 7). If they took from the land anything except oil and gas, they had no right to any of it.

But the District Court overlooked the law of Louisiana, contained in Act 252 of the Louisiana Legislature for 1924 (Dart Statutes, Section 4783), which stipulates:

> "Gas means natural gas as it is taken from the earth, *including any gasoline content it may have,* but it does not include casing-head gas." (Italics ours.)

Thus when the lease sued on uses the word "gas," it includes the gasoline content, and petitioner is entitled to the royalty stipulated on both the gasoline and the dry gas.

The Court of Appeals affirmed this judgment of the District Court, thereby perpetuating the above jurisprudence, unless this Honorable Court intervenes.

The Court of Appeals said:

> "The royalties provided for in the contract were for the gas and not for the gas and also any elements which might later be taken by some artificial process from that gas."

However, the Court of Appeals ended its decision with an error of fact. The decision states:

"The petition alleged, the defendant admitted, and the court below found the market value of the gas at the well during the prescribed period to be five cents per M. C. F. . . ."

Since this case was decided on a demurrer, the allegations of the petition are to be accepted as true. A simple reading of the petition will show that the petition states the price of five cents was not the price at the well, but was the price of the dry gas, as sold in commerce *after* the gasoline had been extracted.

Conflict With Applicable Local Decisions

The issue here presented has been squarely and expressly decided by the Supreme Court of Louisiana in at least four cases, where that court had before it leases substantially the same as in the case at bar, and the question was squarely presented.

In the case of *Wemple* v. *Producers Oil Co.*, 145 La. 1031, 83 Southern Reporter 232, the Supreme Court of Louisiana said:

"We find nothing in this record which seems to impair the doctrine that no one is presumed to give, and hence nothing to warrant the belief that it was within the contemplation of the contract between plaintiff and defendant that defendant should be allowed to take more than $20,000 worth of gasoline (valued at about half the market price) from plaintiff's land, within a period of less than ten months, or any other product of value, and give nothing in return. . . . The purpose of the contract was, however, confined to the production of oil and gas; and in conveying to defendant, subject to the reservations and conditions expressed in the contract, all of those minerals that might be produced and saved on or off the premises, plaintiff, as owner of the land, conveyed nothing else that defendant, in the exercise of its right to drill and

to make use of the surface of the land, for oil and gas purposes, might produce therefrom or find therein or thereon. So that, if casing-head gas be neither oil nor gas, within the meaning of the contract, defendant is not entitled to it, or any part of it, whether by virtue of the contract or otherwise."

In the case of *Coyle* v. *Louisiana Gas & Fuel Co.*, 175 La. 990, 144 Southern Reporter 737, 739, the Supreme Court of Louisiana said:

"We find nothing in the record to warrant the belief that the lease under review contemplated that the defendant should be allowed to take the gasoline, a product of much greater value than the gas, from the leased premises by merely paying him for one-eighth of the gas.

"If its gasoline content is not regarded as included in the gas, within the meaning of the contract, then, obviously, defendant is not entitled to it or any part of it. If it is so regarded, then one-eighth of it is due to plaintiff by virtue of the agreement."

The case of *Crichton* v. *Standard Oil Co.*, 178 La. 57, 150 Southern Reporter 668, affirmed this principle.

In *Wall* v. *United Gas P. S. Co.*, 178 La. 908, 152 Southern Reporter 561, the claim was made that since the lease said nothing about gasoline, that the land-owner, as lessor, was entitled to *all* of the gasoline. The Supreme Court of Louisiana held that the land-owner was entitled only to one-eighth royalty on the gasoline, in the following language:

"We find no merit in the contention that the lessees were entitled to none of the gasoline extracted from the natural gas. According to the expert testimony introduced in this case, practically all natural gas contains some gasoline which comes to the surface in the form of vapor. The presence of the gasoline in the

natural gas, they say, is probably due to the fact that at some remote period, the gas came in contact with oil, from which it took up some of the lighter fractions. Gasoline is therefore one of the constituent elements of 'natural gas' as that term is ordinarily used and understood. Act No. 252 of 1924 is an act to conserve the 'natural gas' resources of the state, and in section 13 thereof, it is stated that 'gas' means natural gas as it is taken from the earth, including any gasoline content it may have.

"This Court, in Coyle *v.* Gas & Fuel Co., supra, stated, in fact held, that the 'gasoline was part of the gas produced'. It has been so held by the courts of Oklahoma and Texas. See Humble Oil & Rfg. Co. *v.* Poe (Tex. Com. App.) 29 S. W. (2d) 1019; Lone Star Gas Co. *v.* Stine, et al. (Tex. Com. App.) 41 S. W. (2d) 48, 82 A. L. R. 1299.

"The lessee owned seven-eighths of the natural gas produced under the lease, which included all the constituent elements thereof, all that the gas contained.

"In the alternative, plaintiffs ask that, if it should be held that they were entitled to only one-eighth of the gasoline, they be paid the gross value thereof without deducting the expense of extracting it from the gas.

"In this respect the case is governed by the ruling in the Coyle and Crichton cases, supra."

Under the ruling in the case of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, petitioner respectfully suggests that the Federal jurisprudence should be made to conform to the above holdings of the Supreme Court of Louisiana.

The Court of Appeals did not question this jurisprudence of the State of Louisiana, nor differentiate the case at bar. The Court of Appeals simply ignored this Louisiana jurisprudence.

Conclusion

Petitioner respectfully suggests that the decision of the Court of Appeals is in conflict with the applicable decisions

of the local law, and deprives petitioner of his property and contractual rights without due process of law; and that the jurisprudence here established is of sufficient importance to justify the consideration of this Court, because it settles the law for all of the natural gas interests on an important detail of the relations between land-owners and producers.

Respectfully submitted,

G. P. Bullis,
Counsel for Petitioner.

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